

**Statement of Timothy E. Gilmartin, Mayor  
Metlakatla Indian Community  
for the Senate Committee on Indian Affairs Hearing on  
Indian Tribal Self-Determination and Contract Support  
September 15, 1999**

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On behalf of the Metlakatla Indian CommunityñAnnette Islands Reserve, I submit the following statement regarding contract support and the Indian Self-Determination Act. The Metlakatla Indian Community is a federally recognized tribal governing body which exercises jurisdiction over the Annette Islands Reserve under a constitution and by-laws approved by the Secretary of the Interior. The Community is the beneficial owner of the Reserve and operates federal programs for its members under tribal self-government agreements with the Secretary of the Interior and the Secretary of Health and Human Services.

We outline below a possible compromise measure designed to address the present funding crisis in contract support funding, while still preserving the rights of tribes to contract additional federal programs. The Community feels the proposal may also offer an opportunity for developing a permanent solution to the contract support "problem" which would be acceptable to both the tribes and to Congress.

We note that this proposal is presented in the context of a major challenge by some in Congress to the core principles underlying tribal sovereignty and the policy of self-determination. It is our firm belief that tribes must strenuously fight any effort to erode tribal sovereignty and the policy of self-determination. Measures such as the proposal to continue the moratorium on new contracting are simply unacceptable. In our view, the most effective method to fight such challenges is to develop a solution that answers the questions and concerns that have been raised about "contract support" funding, makes no compromises on issues of tribal sovereignty, makes only minimal changes to the Indian Self-Determination Act, and preserves the overall policy of self-determination. We believe that the proposal outlined below is consistent with these goals.

We urge the Committee to keep in mind the key role 'contract support' funding has played in permitting tribes to exercise their rights under P.L. 93-638 without paying a financial penalty for contracting. That is, without having to reduce the level of services to pay tribal overhead costs which do not burden federally operated programs. While we have never received the full amount to which we are entitled under section 106(a)(2) of the Act, we have received sufficient funding for contract support to enable us to proceed with self-determination and self-governance on a financially viable basis.

We think that the proposal explained below, when combined with full funding for contract support, would assure that Indian tribes could continue on the road to effective tribal self-government.

**Contract Support Reform Proposal**

Our proposal (bill language for which is attached) would temporarily pause the growth in the overall amount of contract support funding required and provide a process for identifying and addressing improvements to the contract support system. The proposed plan would require that between FY 2000 and FY 2002, tribes desiring new or expanded contracts would provide the IHS and BIA two years advance notice of their anticipated contract support requirements. (Presently, there is only a 90-day notice period.) The tribes would, however, have the option to contract prior to the end of the two-year notice period although they would do so without any right or claim to contract support funds during that period.

The longer notice provision would provide the Congress a two-year window in which to address the current contract support shortfall before additional obligations are added. Unlike the moratorium, the

proposal would enable the self-determination process to move forward since additional contracting would be permitted. The two-year notice period also coincides with the two-year budget formulation period. Thus, the agencies and the Congress would be able to plan better for funding the contract support costs.

The two year notice period would also allow time for a negotiated rulemaking committee to review the present system and develop, if necessary, long-term improvements. The resulting regulations would provide consistent standards for the Departments of the Interior and the HHS, designed to ensure equity and reliability. We provide, for your consideration, proposed bill language to establish a negotiated rulemaking committee, which would ñ within a specified period of time ñ develop regulations to ensure fairness and eliminate the obstacles to achievement of the goals of the Indian Self-Determination Act.

Our support for such a process has been strengthened by two recent problems we have had with the IHS and BIA. Under the Community's FY 1999 annual funding agreement with the Indian Health Service, and in accordance with IHS Circular 96-04, it was specified that we would be paid the amount owed to us as provided by sections 106(a)(2) and 106(a)(3) of the Act as well as payment for negotiated start-up costs, both with a priority date of May 7, 1996. Unfortunately, when funds became available, IHS failed to follow the guidelines established by the Circular and instead adopted a different policy for distribution of contract support which resulted in the Community not receiving any of the \$83,772 in start-up costs to which it was contractually entitled. In the second instance, the Community has been underfunded in its contract support funds received under its contract with the BIA. This is due to the Inspector General's method for calculating indirect cost rates, which has been held in the Ramah case to wrongly include non-fully funded federal programs in the calculation.

It is our hope that the proposal offered, which provides for negotiated rulemaking, will clarify the contract support system so that further inconsistencies and errors in the system are prevented.

We appreciate the opportunity to present the views of the Metlakatla Indian Community. Thank you for the Committee's attention to an issue of great importance to tribes and the future implementation of the federal policy of tribal self-determination.

### **Notice Provision**

Notwithstanding any other provisions of law, including but not limited to section 106 of the Indian Self-Determination and Education Assistance Act (Pub.†L.†93-638), during FY 2000 - FY 2002, neither the Secretary of the Interior nor the Secretary of Health and Human Services shall pay or obligate the United States to pay contract support funds for any new or expanded contract or compact based upon a request submitted after July 1, 1999, except under the following terms and conditions:

- (1) the Indian tribe or tribal organization must provide the Secretary of the Interior or the Secretary of Health and Human Services with notice of its anticipated contract support requirement two years in advance of payment for such costs;
- (2) although an Indian tribe or tribal organization is entitled to begin contracting or compacting after the existing 90 day notice period, the Indian tribe or tribal organization shall have no right, entitlement or claim to any contract support funding for the new or expanded contract or compact during the two year notice period;
- (3) within six months after an Indian tribe or tribal organization notifies the Secretary of the Interior or the Secretary of Health and Human Services of its anticipated contract support requirement, the appropriate Secretary shall conduct an initial negotiation with the Indian tribe or tribal organization to determine the estimated amount that the Indian tribe or tribal organization is eligible to receive for contract support costs;
- (4) a final negotiation of the request will take place within two years after the date of the initial notice by the Indian tribe or tribal organization;
- (5) the Secretary of the Interior and the Secretary of Health and Human Services shall report updated estimates of contract support requirements for the next two fiscal years to the applicable authorizing and appropriations committees of Congress on each April 1 and October 1 after October 1, 1999; and
- (6) all funds available for contract support in FY 2000, FY 2001 and FY†2002 shall be utilized by the Secretary of the Interior and the Secretary of Health and Human Services to address the shortfall in contract support for programs contracted or compacted, or requested to be contracted or compacted, on or before July 1, 1999.

Provided, nothing herein shall diminish the right of an Indian tribe or tribal organization to receive its full share of funds other than contract support funds as otherwise provided in the Indian Self-Determination and Education Assistance Act.

### **Negotiated Rulemaking Provision**

Section 107 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450k) is amended by adding a new subsection (f):

(f) (1) Notwithstanding any other provisions of law, including but not limited to subsection (a), paragraph (1), the Secretary of the Interior and the Secretary of Health and Human Services are authorized and directed to promulgate regulations to govern the manner in which contract support costs shall be calculated in accordance with the requirements of section 106(a)(2) and 106(a)(5) and the manner in which funds for the payment of such costs shall be distributed to tribes and tribal organizations.

(2) (A) Not later than 60 days after the date of enactment of this Section, the Secretary of the Interior and Secretary of Health and Human Services shall establish a negotiated rulemaking committee pursuant to section 565 of Title 5, to promulgate such regulations as are necessary to carry out this part.

(B) The Secretary shall adapt the negotiated rulemaking procedures to the unique context of Self-Governance and Self-Determination and the government-to-government relationship between the United States and the Indian tribes to ensure that the rulemaking committee represents the interest of diverse small, medium and large tribes, large and small contractors, and tribes operating under Title I, III and IV of this Act.

(C) A negotiated rulemaking committee established pursuant to section 565 of Title 5, to carry out this section shall have as its members only Federal representatives of the Office of Management and Budget, the Department of the Interior Office of Inspector General and Office of the Secretary and DHHS Division of Cost Allocation and tribal government representatives. The rulemaking committee shall comply with the requirements of the Federal Advisory Committee Act, P.L. 92-463, as amended; provided, however, that the committee shall not be required to file its charter with the Administrator of General Services before meeting or taking any action.

(D) The negotiations referred to in paragraph (a) shall be conducted in a timely manner. Proposed regulations to implement this part shall be published in the Federal Register not later than 180 days after enactment of this Act and final regulations shall be published in the Federal Register on or before January 1, 2001.

(3) The regulations promulgated under this subsection shall be promulgated

(A) in conformance with sections 552 and 553 of Title 5, United States Code, and subsections (c) and (e) of this section; and

(B) as a single set of regulations in Title 25 of the Code of Federal Regulations.

(4) The regulations so promulgated shall be designed to:

(A) provide for uniform rules and standards for the Secretary of the Interior and the Secretary of Health and Human Services concerning the determination and distribution of contract support funds;

(B) provide for simplicity in both application and interpretation;

(C) be fair and equitable to all tribal contractors, with due consideration for such

differences as to size and geographic location;

(D) permit prompt payment of contract support funding without unreasonable delay beyond the date that performance commences; and

(E) avoid unreasonable disruptions to existing tribal programs based upon past practices and funding levels.

(5) Notwithstanding any other provision of law (including any regulation), the Secretary of the Interior and the Secretary of Health and Human Services are authorized to jointly establish and fund such interagency committees or other interagency bodies, including advisory bodies comprised of tribal representatives, as may be necessary or appropriate to carry out the provisions of this subsection.

(6) The regulations promulgated under this subsection shall govern notwithstanding any other federal regulation, circular or guideline.

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